No. 21853

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J.HOWARD ARNOLD — APPELLANT

vs.

FRANCES K. ARNOLD — Appellee

APPELLANT'S OPENING BRIEF

Appeal from the

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

J.HOWARD ARNOLD

P.O. Box 919,

Berkeley 1, Calif.

APPELLANT

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JURISDICTIONAL BASIS

This appeal is taken from a final judgment made and entered in the United States District Court for the Northern District of California, and is prosecuted in accordance with the provisions of Rule 72 et seq. of the Federal Rules of Civil Procedure. Jurisdiction of this Court is based on Section 47, Title 11, United States Code. Jurisdiction of the District Court is based on Sections 11, 711, and 712, Title 11, United States Code.

On June 19, 1962, Appellant J.HOWARD ARNOLD filed in U.S.District Court, San Francisco, an original petition for an Arrangement with Creditors under Chapter XII, Title 11, U.S. Code. On Sept. 25, 1962, the proceeding was transferred to Chapter XI by amendment.

On October 30, 1962, the Referee, the Honorable BERNARD J.ABROTT, made and entered an order confirming an Arrangement under Chap.XI. On Feb.28, 1963, on petition of debtor's wife, FRANCES K. ARNOLD, Appellee, herein, Referee ABROTT ordered the confirmation set aside for "fraud in procurement" under Sec.386(2) of the Bankruptcy Act, debtor's non-disclosure of his wife's pending divorce action allegedly preventing involvement of community real property in the Arrangement. The Referee's order setting aside confirmation was approved by District Judge SWEIGERT on review aand affirmed on appeal by this Court (No. 18854) on Jan. 24, 1964.

On June 29, 1964, Appellant filed an Amended Plan of Arrangement, substantially similar to the first Plan, and urged confirmation on the ground that his wife's divorce action was totally irrelevant. The Referee denied confirmation on Nov. 10, 1964, and on review

District Judge ZIRPOLI upheld the Referee's order. This Court affirmed the order on appeal, Feb. 28, 1966 (No. 20107), holding that despite the plain provisions of Sec.386(2) permitting a second Arrangement to be offered by the debtor, after curing of the "fraud in procurement" (i e. technical error), it was barred by an alleged final adjudication on the merits in the first appeal. Rehearing was denied by this Court on April 5, 1966.

Meanwhile, on March 9, 1966, despite his loss of jurisdiction to this Court on appeal, the Referee filed an Order to Show Cause Why Debtor Proceedings Should Not Be Dismissed (Transcript, pp.1-2).

On July 12, 1966, Appellant filed his objections to dismissal of the Arrangement proceeding (Transcript, pp.4,5,5-A) and noticed a motion to remove the cloud on the title of the real property involved in the Arrangement, said cloud having been created by the divorce proceedings between Appellant and Appellee. On Sept. 12, 1966, under the title "ORDER DISMISSING PROCEEDINGS",(Transctipt, pp.17-19) the Referee decided both motions, denying Appellant's motion to remove cloud on title and granting the court's own motion to dismiss. On Nov. 16, 1966, District Judge GEORGE B.HARRIS ruled that Appellant's petition for review "is hereby DENIED", (Transcript, p. 58), and on Feb.9, 1967, denied Appellant's motion to alter and amend the judgment (Transcript, p. 69). Notice of appeal to this Court was filed on March 10, 1967.(Transcript, p.70)

The District Court has summary jurisdiction to determine validity of alleged liens on a debtor's property, by Sec. 67(a)(4), Bankruptcy Act (Sec.107a(4), U.S.Code).

STATEMENT OF THE CASE

Five years ago today, Referee ABROTT confirmed Appellant's valid and proper Arrangement with Creditors, which he later set aside at Appellee's request on the presumption that her divorce action somehow prevented the involvement of Appellant's community real property in the Arrangement, and that the divorce court's "award" of Appellant's rights to Appellee effected a valid transfer of title to property in District Court custody.

In the order on appeal, the Referee refuses to exercise the paramount and exclusive jurisdiction in rem conferred on him by the Bankruptcy Act, and by such unlawful abstention seeks to give validity to the divorce "award" as a transfer of title, which it is not. Well-settled jurisdictional law holds that said property was seized by the District Court when Appellant's original debtor's petition was filed, that the Superior Court never had and could not take by divestiture such jurisdiction in rem, and could not give the assets to Appellee and the debts to Appellant in defiance of both State and Federal law. In addition to his unwarranted abstention, the Referee seeks to end the proceedings by dismissal without confirmation of an Arrangement, although the cloud on the real-property title is the sole obstacle to such confirmation. His motion to dismiss was void for lack of jurisdiction, as well as improper because the creditors were never notified of it.

The Referee's prior invocation of Sec. 386(2), Bankruptcy Act, was improper as a substitute for removal of the cloud on the title, but affirmation of his order on appeal was no bar to confirmation of a subsequently offered Arrangement to which a debtor is entitled.

SPECIFICATION OF ERRORS

(1) The Referee erred in his Finding of Fact (Transcript, p.18), that "the matter with reference to Petition to Remove Cloud on Title has previously been decided", as there has been no such decision by a court of competent jurisdiction, and none is cited.

(2) The Referee erred in his Finding of Fact (ibid.) that "the Superior Court . . awarded the real property . ." to Appellee, if by "awarded" he meant "effected a valid transfer of title" of property in legal custody of the District Court.

(3) The Referee erred in his Conclusion of Law (Transcript, p.19) that "the title to the real property has previously been decided", since he is the only judicial officer with power to do so, and he has never made such a decision.

(4) The Referee erred in wilfully abstaining, without legal right, from the exercise of the paramount and exclusive jurisdiction in rem over a debtor's property, conferred on him by the Bankruptcy Act, by which he must adjudicate the validity of the Superior Court judgment on which Appellee bases her claim to the real property in fraud of creditors and in defiance of Appellant's rights.

(5) The Referee erred in ordering the proceedings dismissed, without notice to creditors, and prior to a final decision on appeal of Appellant's motion to remove cloud on title.

(6) The District Judge erred in merely denying Appellant's petition for review, without making an independent determination of the questions of law involved.

SUMMARY OF ARGUMENT

The Referee has twice denied confirmation to valid plans of Arrangement under Chapter XI on the ground that Appellee's divorce judgment bars involvement of community real property in Appellant's proceeding for an Arrangement. Federal and California law agree that no such bar exists, but the Referee refuses to exercise his paramount and exclusive jurisdiction in rem over property in possession of the debtor on filing his original petition, claiming incorrectly that the question of title has been decided and by his unwarranted abstention denying debtor and creditors the benefits of the Bankruptcy Act. The Referee should have taken jurisdiction and removed the cloud on Appellant's title caused by Appellee's divorce judgment, clearing the way for confirmation of Arrangement. The District Judge likewise abstained improperly, failing to make the required independent analysis of the questions of law presented, and giving no reason whatever for denying the petition for review. The Superior Court has never held jurisdiction in rem over Appellant's debtor's estate enabling that court to transfer title to Appellee, and no title transfer has taken place, but only a determination of inchoate rights between the spouses and subject to creditors' claims. Only the District Court has jurisdiction to quiet title or remove a cloud on title to debtor's real property, and the District Court has never done so. In the complete absence of any decision by the District Court on the issue of title, res judicata cannot be claimed by Appellee or Referee. Appellee has no lien or claim as a wife entitling her to ownership of community property free and clear of creditors' claims; she is not a "supercreditor" but a co-debtor, jointly liable for her husband's debts.

ARGUMENT

I

A COURT OF BANKRUPTCY HAS JURISDICTION TO QUIET TITLE AND REMOVE CLOUDS ON TITLE TO PROPERTY INVOLVED IN ITS PROCEEDINGS.

Any property possessed by a debtor at the time of filing his original petition under the Bankruptcy Act is legally seized by the District Court, whose paramount and exclusive jurisdiction in rem thereupon attaches, barring any other court from dealing with that property by imposition of liens or transfer of title.

> "The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the (debtor) and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far in rem that the estate is regarded as in custodia legis from the filing of the petition . . It follows that liens cannot thereafter be obtained nor proceedings be had in other courts to reach the property, the District Court having acquired the exclusive right to administer all property in the(debtor's) possession.. ."
>
> Straton v. New (1931) 283 U.S. 318

The property seized includes community property if the debtor is a husband (but not if the debtor is a wife, who holds no ownership interest reachable by creditors through judicial process, but only a protected expectancy, an inalienable heirship.)

Grolemund v Cafferata (1941) 17 Cal. 2nd 679

Cummings (Mrs.), In re (1949) 84 Fed. Supp. 65 (DC,Cal.)

Taylor v. Sternberg (1934) 293 U.S. 470

A Federal court of bankruptcy has jurisdiction in title disputes,

Schultz v. England (1939) 106 Fed. 2nd 764 (CA,9th)

and upon finding that the debtor was in possession at the time of filing his original petition may act summarily.

Sulmeyer v. Pfohlman (1964) 329 Fed. 2nd 915

A wife's claim to community property may be determined summarily.

Freitas, In re (1936) 16 Fed Supp. 557 (DC, Cal.)

In the case at bar, since Appellant's possession continued until his eviction by void Superior Court order on March 20, 1963, and his original petition was filed June 19, 1962, the District Court had jurisdiction --exclusively-- to quiet title summarily, and the Referee was duty-bound to make a determination de novo of the validity of the Superior Court "award" as a transfer of title, if he considered that judgment a bar to confirmation of Arrangement.

II

THE REFEREE IMPROPERLY ABSTAINED FROM THE EXERCISE OF HIS PARAMOUNT AND EXCLUSIVE JURISDICTION TO REMOVE THE CLOUD ON THE TITLE.

It might be thought, on casual reading of the order on appeal (TR. p. 18-19) that the Referee had found the Superior Court judgment "award" to be a valid transfer of title under State and Federal law, but study of the Reporter's Transcript (Transcript, pp.76-82) shows clearly that he had not examined the law, but had merely accepted a void judgment of another court as a matter of comity, refusing to pass on its validity and looking to other courts for a final determination of the matter. The Referee has said:

> "I do not think that it is within the power of the Referee in Bankruptcy to pass judgment on what the Superior Court did and any Appellate State Court did. I cannot reverse them."

Transcript, p.79, line 18.

"So if some other Court has made an award of the real property to Frances Arnold, I do not think I have the power to reverse the State Court."

Transcript, p. 80, line 4

"Well, I am not ruling on the Cloud on the Title. What I am saying is the State Court awarded the real property to your wife."

Transcript, p.80, line 13

"That would be up to the District Court on the Review to decide whether or not the property was actually in your possession and in the possession of the Federal Court and the Superior Court exceeded its jurisdiction in awarding the property to Frances Arnold."

Transcript, p. 80, line 24

It is evident that the Referee erred in refusing to make the basic decision himself, preferring to leave it to the District Judge; that the Referee incorrectly believed he had no power to declare the Superior Court judgment void as a transfer of title; that the Referee did not realize that the "award" was not a transfer of title, but only of a wife's inchoate rights from her husband; that the Referee failed to observe that the District Court of Appeal had not affirmed the "Award" but effectively reversed it by providing it would not take effect ~~on~~ until Final Judgment of Divorce, and thus no bar whatever to confirmation of the Arrangement was offered by the Superior Court judgment, which did not determine title.

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SUPERIOR COURT JURISDICTION, CONCURRENT OR EXCLUSIVE, OVER DEBTOR'S ESTATE HAS NEVER EXISTED, NO TITLE TRANSFER OCCURRING AT ANY TIME.

Although Appellee's divorce complaint was filed Nov. 29, 1961, antedating Appellant's original Arrangement petition by six months, its priority in time is meaningless so far as seizure of community property is concerned. Filing of a divorce complaint does not accomplish a legal seizure, so as to place the property in custody of the court in the same manner as filing of a Bankruptcy-Act petition.

Lord v. Hough (1872) 43 Cal. 581

Harrold v. Harrold (1954) 43 Cal. 2nd 77

"While a divorce is pending, the power of a husband over the community property exists until the entry of a final decree."

Harrold v. Harrold, supra, at p. 81

Thus, on Nov. 29, 1961, the Superior Court did not seize the community property upon filing of the divorce complaint. On June 19, 1962, Appellant's filing of his original petition for an Arrangement resulted in seizure of the community real property by the court of bankruptcy, which has held the property in custody since that time. Normally, the Superior Court takes jurisdiction in rem to transfer title or impose a lien when judgment is recorded; until that time, the property remains under management and control of the husband.

Chance v. Kobsted (1934) 66 Cal. App. 434

However, when the Interlocutory Judgment in Arnold v. Arnold was recorded on Oct. 22, 1962, the property was held by the District Court, thus being unavailable for seizure by the Superior Court. Even if the Superior Court had seized the property and held it in custody, District Court seizure would not be prevented.

"The fact that the jurisdiction of the (Federal) court is paramount effectually distinguishes that class of cases which hold that as between courts of concurrent jurisdiction property in the hands of a receiver of one of them cannot rightfully be taken from him without that court's consent by a receiver subsequently appointed by the other court . . the jurisdiction of the (Federal) court is paramount and not concurrent . .the power of the state court,. necessarily came to an end with the supervening bankruptcy."

Gross v. Irving Trust Co. (1933) 289 U.S. 342

". . its being prior in time cuts no figure. The priority of right in the bankruptcy court . .must prevail . .without regard to the rules of comity, for as respects this matter the courts are not of concurrent jurisdiction."

Moore, In re (1930) 42 Fed. 2nd 475 (DC, Ga.)

The only recognized exception to the paramount jurisdiction in rem of the bankruptcy court occurs when the suit in the other court has the purpose of enforcing a pre-existing lien, as in a foreclosure of a mortgage on real property.

"A state court has exclusive jurisdiction of the res only to the extent the liens thereon are valid as against the trustee in bankruptcy. . state court action, to the extent it may have attempted to deal in rem with the property, abated upon the filing of the petition."

Engelbrecht v. Wildman (1959) 263 Fed. 2nd 133 (CA, 9th)

Walker v. Detwiler (1940) 110 Fed. 2nd 154 (CA, 6th)

No lien in favor of the wife existing, divorce actions are excluded.

IV

A DIVORCE COURT CANNOT LEGALLY AWARD COMMUNITY ASSETS TO A WIFE FREE AND CLEAR OF CREDITORS' CLAIMS, NOR DEBTS TO A HUSBAND.

A divorce action between two spouses is inherently incapable of adjudicating the rights of creditors unjoined as defendants. The judgment in such an action merely settles the rights of the wife as against the husband, without impairing the claims of creditors.

> "This divorce action is not an in rem action to quiet title against the world; it is a disposition of property as between the spouses incident to the dissolution of the marital relation."

McClenny v. Sup. Ct. (1964) 62 Cal. 2nd 140 at 147

Farrow v. Ostrom (1943) 16 Wash.2nd 547, 133 Pac.2nd 974

Arneson v. Arneson (1951) 38 Wash.2nd 99, 227 Pac.2nd 1016

If the assets are given to the wife, without allowance for the debts of the marital community, the judgment is against law, void.

Rethers v. Rethers (1956) 140 Cal.App. 28

"Community property", as the term is used in the divorce laws (Sec. 146, Calif. Civil Code) does not refer to total assets, but to the residual net assets after allowance for the secured and unsecured debts of the husband, for which the marital community is liable.

Packard v. Arellanes (1861) 17 Cal. 525

Bank of America v. Mantz (1935) 4 Cal. 2nd 322

Grolemund v. Cafferata (1941) 17 Cal. 2nd 679

Earlier, this Court followed established California law in deciding against another wife who sought to take community assets without paying creditors' claims against the marital community:

"(Her) contention seems to be that as a member of the marital community she is entitled to the possession of the entire community property and the community debts must go unpaid, save and except such indebtedness as is secured by mortgage or other encumbrance executed by the husband and wife. . It would seem to be a sufficient answer to (her) contention to call attention to the fact that the Supreme Court of California, as early as 1861. . held that the term 'community property' as used in the statutes of California as between husband and wife and the creditors meant a residuum of the property . . after the payment of the community debts . . the courts of California have decided that the community property . . is subject to community debts. . It follows that the trustee in bankruptcy is entitled to the possession of community property for the benefit of creditors. . "

Hannah v. Swift (1932) 61 Fed. 2nd 307 (CA,9th)

This Court has recently twice reaffirmed this principle of law.

Sulmeyer v. Pfohlman (1964) 329 Fed. 2nd 915 (CA, 9th)

Martolf v. Elliott (1963) 326 Fed. 2nd 204 (CA, 9th)

It should be followed in the case at bar, where Federal courts have permitted illegal seizure and disposal of a debtor's estate by an aggressive and ruthless divorce court acting in open defiance of California and Federal law.

Without satisfaction of creditors' claims, an Interlocutory Judgment of divorce cannot transfer title to community property, but can only determine the rights of the spouses, tentatively, for its guidance in granting a possible later Final Judgment of Divorce.

THE STATE COURT DECISIONS REQUIRE ONLY INTERPRETATION, NOT REVERSAL BY THE REFEREE, FOR PROPER SETTLEMENT OF QUESTIONS OF TITLE.

The Referee, like the Superior Court trial judge, presumes incorrectly that the Interlocutory Judgment could and did transfer title of Appellant's property (his debtor's estate) to Appellee without satisfying or even considering creditors' claims, and without any regard for the simultaneous proceedings in Federal District Court. However, the District Court of Appeal held that no transfer of title occurred on Interlocutory Judgment:

> "The interlocutory decree, however, makes a present disposition of the community property. It is now settled that such an award is improper and, where made, should be modified by the appellate court so as to provide that the provisions disposing of the community property of the parties shall be effective upon the entry of the final decree of divorce. (Brown v. Brown (1960) 177 Cal. App. 2nd 387). . For the reasons above stated, the trial court is directed to modify the interlocutory decree of divorce to provide that the provisions disposing of the parties' community property shall be effective upon the entry of the final decree of divorce; the interlocutory decree, as so modified, is affirmed. ."

Arnold v. Arnold, 1 Civil 21272, Feb. 14, 1964 (unpubl.) The "award" is thus merely a judgment in personam, determining the rights of the parties after claims of creditors are satisfied, and making no present attempt to transfer title to real property. Obviously, if this decision had reversed a long line of decisions upholding the rights of creditors, it would have merited publica-

ion under Rule 976, Calif. Rules of Court; but it was not publish-
d, and cannot be held to have the meaning the Referee gives it.
kewise, there is no need for the Referee to reverse the District
urt of Appeal decision, which does not seek to quiet title in
ppellee, but only determines personal rights. (In other decisions
has been held that the Superior Court had jurisdiction in rem
fficient to evict Appellant from his debtor's estate, but such
cisions are irrelevant here, as well as obviously incompatible
th well-settled Federal law upholding the paramount and exclusive
risdiction in rem conferred by the Bankruptcy Act.) After the
terlocutory Judgment of Divorce, Appellee's interest remained

" . .an inchoate one and not such as to form the basis for an action to quiet title."

Chance v. Kobsted (1924) 66 Cal. App. 434

e case at bar is complicated by the dual status of Appellant as
btor in an Arrangement proceeding and husband in a divorce suit.
debtor, he is answerable only to the court of bankruptcy for
s control of his debtor's estate; as husband, he has no estate
be controlled by the divorce court through its jurisdiction in
rsonam over him in the role of divorce-action defendant.

Coleman v. Alcock (1959) 272 Fed. 2nd 618 (CA, 5th)

Terrace Lawn Gardens, In re (1958) 256 Fed. 2nd 398 (CA, 9th)

rendition of Interlocutory Judgment of Divorce, Oct. 22, 1962,
pellant held no title to community property as a husband; since
ne 19, 1962, he had held title as debtor in possession acting as
ustee for the District Court, which alone had power to determine
tle and possession of property in its custody.

PELLEE HAD NO LIEN OR CLAIM AGAINST THE COMMUNITY PROPERTY THAT ULD NULLIFY FEDERAL JURISDICTION AND BAR THE ARRANGEMENT.

second complication in the case at bar arises from the priority time of the filing of the divorce action, six months ahead of e Arrangement petition. As already shown (This Brief, p.10), the portant factor in determining jurisdiction over the property is t time, but lien rights, and Appellee had no lien or other claim ich could serve to give her the status of a "super-creditor" titled to deprive a Federal court of a debtor's estate. Filing her divorce action gave her no lien, nor did rendition of the terlocutory Judgment of Divorce only 8 days before confirmation Arrangement (the Referee evidently attaches great importance to s 8-day priority, but incorrectly, as the important date is t of filing debtor's original petition, which places his prop- y in custody of the District Court, and not that of confirma- n involving property long since taken into court custody and refore unreachable by any Superior Court judgment). Appellee no lien merely because of her status as a debtor's wife,

Potts, In re (1944) 142 Fed. 2nd 883 (DC, Ky.)

Hawk v. Hawk (1800) 102 Fed. 679 (DC, Ark.)

does she acquire any lien by the mere filing of a divorce suit.

Todd v. Todd (1955) 133 Colo.1, 291 Pac. 2nd 386

Panton v. Lee (1958) 261 Fed. 2nd 183 (CA, 10th)

Hornsby v. Hornsby (1936)127 Tex. 474, 93 SW 2nd 379

ition of the Interlocutory Judgment of Divorce did not disturb husband's management and control, which continue to Final Judg- of Divorce,

defrauding the creditors of the husband and amounted to a legal fraud. . ."

Panton v. Lee (1958) 261 Fed. 2nd 183 (CA, 10th)

ere, no lien attached because of the operation of Oklahoma law; the case at bar, no lien attached because of the prior seizure the property by the Federal court. Without a valid pre-existing en, the debtor's wife cannot legally use State court process to in title to community property in disregard of creditors' rights.

VII

EN PRIOR TERMINATION OF A MARRIAGE DOES NOT IRRETRIEVABLY ELIM-ATE COMMUNITY PROPERTY FROM THE ESTATE OF A DEBTOR HUSBAND.

a debtor husband should transfer title voluntarily to his wife ore filing his original petition, the court of bankruptcy would laim the property on grounds of fraudulent preference. If the nsfer is made forcibly by a divorce court, against the wishes of husband, the property may still be returned to the debtor's ate and the transfer voided as fraudulent, under Section 70(e)(1) kruptcy Act, if it rendered the husband bankrupt without fair sideration, even though divorce preceded bankruptcy.

Britt v. Damson (1964) 334 Fed.2nd 896 (CA,9th)

Bankruptcy Act confers upon the District Court summary juris-tion to compel surrender of a voidable preference.

Katchen v. Landy (1965) 382 U.S. 323

oluntary transfer from an insolvent debtor to his family is sumed to be fraudulent as to creditors.

Menick v. Goldy (1955) 131 Cal. App. 2nd 542

ivorce judgment with the same effect is likewise fraudulent.

HE VALIDITY OF THE INTERLOCUTORY JUDGMENT OF DIVORCE AS A CLOUD N THE TITLE TO DEBTOR'S REAL PROPERTY HAS NEVER BEEN DECIDED.

t is clear from the District Court of Appeal decision (This Brief, . 13) that the Superior Court "award" was not and could not be a ransfer of title at the time of Interlocutory Judgment of Divorce. onsidered as a transfer of title, the Superior Court judgment is oid for lack of statutory authority, as well as for involving roperty in District Court custody. Considered as a tentative det- rmination of spouses' rights, it is valid, but offers no obstacle o confirmation of the Arrangement. The State courts, while usurp- ng and exercising jurisdiction to evict a debtor from his estate, ave not defended, in any quiet-title suit, their jurisdiction in em for the purpose of transferring title to Appellee without con- ideration of community debts. Only the Referee --not any District udge or panel of this Court--seems to regard the Superior Court award" as a title transfer barring confirmation of Arrangement. uotations from the Reporter's Transcript (This Brief, pp.7,8) how clearly that the Referee looks to higher judicial levels for pproval or disapproval of the "award" of title to Appellee, but hus far 3 District Judges and 2 panels of this Court have failed r refused to decide whether the Interlocutory Judgment gave title o Appellee, though that point is the central one in this case.

n the first review and appeal (No. 18854 in this Court), the eferee's order setting aside the Arrangement under Sec. 386(2), ankruptcy Act, was affirmed.

Arnold v. Arnold (1964) 326 Fed. 2nd 960 (CA,9th)

hen, as now, the Referee was motivated by doubt of the ownership
f the community real property involved in the Arrangement, but the
eason for his decision does not clearly appear from the language
sed by Appellee's counsel in composing the order:

". .fraud was practiced by the debtor. .in procuring the Confirmation of the Arrangement. . by concealing from this Court all facts of his marriage and divorce. ."

bviously, if the divorce judgment transferred the property title
o Appellee, Appellant had, fraudulently or not, failed to disclose
o the Referee a material fact which barred the confirmation; if
ne divorce judgment did not transfer the title, its existence was
ot material and confirmation was not barred. There was no curable
fraud in procurement' (mere technical error) calling for the use
f Sec. 386(2), Bankruptcy Act; there was simply a cloud on the
itle which the Referee should have removed summarily. However,
eferee, District Judge, and this Court all refused to decide the
uestion of validity of the divorce judgment as a transfer of title.

n the second review and appeal (No. 20107 in this Court), the
eferee's order denying confirmation of an amended Arrangement
s affirmed, again with no decision on the central issue of title
o the real property. This Court affirmed on the ground that the
irst appeal "finally adjudicated" the invalidity of the similar
nitial plan, precluding submission of a second plan despite the
ain provisions of Sec. 386(2) permitting curative modification
or the purpose of curing of 'fraud in procurement'.

Arnold v. Arnold (1966) 356 Fed. 2nd 873 (CA,9th)
ain the central issue of property title was left unmentioned.

In the third review, which led to this appeal, District Judge HARRIS again refused to decide the cloud-on-title question, or to remand the case to the Referee for decision; nor did he state any basis for his decisions on petition for review and motion to amend, or indicate that he had made the independent examination of the applicable law which is required of him.

Newcomb Interests,Inc.,In re (1959)171 Fed.Supp.704 (DC, Cal.)

Hedgeside Corp.,In re (1952) 123 Fed. Supp. 933 (DC,Cal.)

IX

WILFUL, UNLAWFUL JUDICIAL ABSTENTION FROM EXERCISE OF JURISDICTION HAS UNJUSTLY DEPRIVED APPELLANT OF BENEFITS OF BANKRUPTCY ACT.

Doubt as to wife's and husband's interests in property is not a difficulty justifying dismissal of Bankruptcy Act proceedings.

Mangus v. Miller (1942) 317 U.S. 178 at 181

The Act contemplates that the debtor emerge with all his property still in his possession, and with his creditors' claims satisfied.

Mangus v. Miller, supra

Wright v. Vinton Branch (1936) 300 U.S. 440

John Hancock Co.v.Bartels (1939) 308 U.S. 180 at 184

In the case at bar, on the contrary, the Appellant has been given no relief, but has been illegally stripped of his debtor's estate by State courts while Federal courts look the other way. It is the plain duty of the District Court to assume jurisdiction and take control of property possessed by a debtor on filing his petition.

Heise v. McMullen (1925) 6 Fed. 2nd 462 (CA,4th)

Sampsell v. Papenhausen (1948) 79 Fed. Supp. 45(DC,Cal.)

A Federal court is obligated to take jurisdiction and decide diffi-

cult or uncertain questions of State law, avoiding abdication to State courts.

Meredith v. Winter Haven (1943) 320 U.S. 228

Am.Auto.Ins.Co. v.Freundt (1939) 103 Fed. 2nd 613(CA,7th)

Natl.Bk.of Comm.v.Council (1950)339 Ill.App.585, 91 NE2nd 66

While in certain special cases some issues may be litigated in the State courts, with Federal court assent, this case is not one in which abstention from the assumption and exercise of Federal jurisdiction is proper; nor may the Federal court abandon its property to the State court.

Mach-Tronics v. Zirpoli (1963) 316 Fed.2nd 820 (CA,9th)

County of Allegheny v. Mashuda Co. (1958) 360 U.S. 185

U.S.Fidelity & Guar.Co.v. Bray (1912) 225 U.S. 305

The Referee may not extinguish creditors' rights, without notice to them, by erroneously dismissing the proceedings without cause, on the assumption that an Arrangement cannot be confirmed.

Koncus, In re (1941) 123 Fed. 2nd 92 (CA, 7th)

Creditors and debtor are entitled to arrive at an Arrangement, if possible, after this Court properly determines their rights.

Wragg v. Fed.Land Bank (1943) 317 U.S. 325

The Referee's action in pressing his own motion to dismiss --void for lack of jurisdiction pending appeal, and improper prior to a final decision on the substantive issue of title--in order to be relieved of the responsibility of removing the cloud on the title, is not commendable and should not be endorsed by this Court.

White's Jewelers, In re (1949)88 Fed. Supp. 145 (DC,Mo.)

Appellant's title should be affirmed by the Referee.

X

APPELLEE'S PLEA OF RES JUDICATA CANNOT PREVAIL HERE, SINCE THE ISSUE OF THE CLOUD ON THE TITLE HAS NEVER BEEN DECIDED.

Appellee contends strenuously (Transcript, pp.13, 48) that all the matters at issue in this appeal have been adjudicated in the two previous appeals, that the rights of the parties hereto have been finally determined, and that Appellant is estopped in seeking a determination of the validity of the Interlocutory Judgment of Divorce as a cloud on the real-property title, that matter being res judicata. However, the res judicata doctrine has no application in this instance, as the causes of action are not the same.

"A former judgment is not a bar to a subsequent action between the same parties if the subject matter involved in the two actions is not identical, although it may conclude the parties as to the issues actually litigated and determined. But identity of the subject matter is not alone a sufficient test. The true requirement is that the causes of action in the two suits shall be the same. . the same transaction or state of facts may give rise to distinct or successive causes of action and a judgment upon one will not bar a suit upon another. Therefore a judgment in a former suit, although between the same parties and relating to the same subject matter, is not a bar to a subsequent action, when the cause of action is not the same. 34 C.J.811"

Walrath v. Roberts (1927) 23 Fed. 2nd 32 (CA,9th)

Rushing v. Mayfield (1937) (Tex.Civ.A.)104 SW 2nd 619

Friend v. Talcott (1912) 228 U.S. 27

The cause of action in the first and second appeals was Appellant's right to have a plan of Arrangement confirmed. In this third appeal, no plan of Arrangement is involved, the cause of action being Appellant's right to have the District Court remove the cloud on the title to his community real property. Both prior appeals were decided on the erroneous supposition that the Referee found "there was fraud in the arrangement", whereas his utilization of Sec. 386(2), Bankruptcy Act, proves that the Referee found only "fraud in procurement" (non-disclosure of the divorce judgment) which was actually non-existent, and did not consider the merits of the Arrangement itself, as this Court supposed he had. This third appeal, on a new issue never previously decided, is not barred by the decisions on the first two appeals.

> "Nor can . .(two cases). . also relied upon by the respondents be considered as authority upon the point, since it is not considered in either opinion."
>
> Mortgage Guar.Co.v.Chotiner (1936) 8 Cal.2nd 110 at 114
>
> "If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined."
>
> Va.-Carolina Chem.Co.v. Kirven (1909) 215 U.S.252 at 257

Moreover, Appellee's counsel, whose masterful efforts at obfuscation and misrepresentation of the issues in the first two appeals may be directly responsible for the absence from this Court's opinions of a definitive holding on the central issue of the case, cannot now be heard to complain that all matters at issue have been decided and that Appellant is engaged in frivolous harassment.

CONCLUSIONS

Referee ABROTT's finding of fact, that the matter with reference to removal of the cloud on title has already been decided, is untrue and clearly erroneous, as is his conclusion of law that the title to Appellant's community real property has previously been decided. Referee ABROTT has unlawfully abstained from the exercise of the District Court's paramount and exclusive jurisdiction in rem under the Bankruptcy Act, whereby he had power to determine the title. District Judge HARRIS has failed and refused to make an independent decision of the questions of law presented to him on review, and has thus deprived Appellant debtor and his creditors of the benefits provided by the Bankruptcy Act. Appellee has no legal claim to title and possession of said debtor's estate, and cannot plead res judicata in the absence of any Federal court decision re title. The District Court decision should be reversed, and the case remanded for further proceedings leading to confirmation of Arrangement.

Dated: October 30, 1967.

Respectfully submitted,

J. Howard Arnold

Appellant, pro se,
and Debtor in Possession

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

J. Howard Arnold

CONCLUSIONS

No. 21851

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J.HOWARD ARNOLD — APPELLANT

vs.

FRANCES E. ARNOLD — Appellee

APPELLANT'S OPENING BRIEF

Appeal from the

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF CALIFORNIA

FILED

J.HOWARD ARNOLD

P.O. Box 219,

Berkeley 1, Calif.

APPELLANT

No. 21853

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

J. HOWARD ARNOLD — APPELLANT

vs.

FRANCES K. ARNOLD — Appellee

APPELLANT'S CLOSING BRIEF

Appeal from the

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

J. HOWARD ARNOLD

P.O. Box 919,

Berkeley 1, Calif.

APPELLANT

I N D E X

C A S E S C I T E D

C A S E S C I T E D (Continued)

S T A T U T E S C I T E D

T R E A T I S E C I T E D

RESTATEMENT OF THE CASE

Although this is the third appeal in this proceeding, a basic preliminary question still remains unresolved: Does the estate of Appellant debtor include the community real property he seeks to involve in his Arrangement with Creditors? Although the Referee should have settled this question summarily at the outset by concluding, in accordance with established California and Federal law, that Appellee's divorce suit was immaterial and irrelevant to this proceeding, he chose instead to charge Appellant with "fraud in procurement" by applying Sec. 386(2), Bankruptcy Act, under which the so-called "fraud" (really excusable technical error) is to be cured by making minor modifications in the Plan of Arrangement, thus eliminating the error and permitting a re-confirmation. However, if Appellant' "fraud" was concealment of actual ownership of the community real property by Appellee as a result of a valid Superior Court "award" in the divorce action, the lack of a major asset is obviously not curable, Sec. 386(2) was not properly used, no Arrangement is possible, and the proceeding should be dismissed for lack of assets. Alternatively, if Appellee did not own the property, because the divorce "award" was not an immediate transfer of title, but only a tentative determination of personal rights in the property for future reference, then the Interlocutory Judgment of Divorce containing such "award" was wholly immaterial to the Arrangement proceeding and offered no bar to confirmation; in the absence of any concealment of a meterial fact, no fraud had occurred, and again no basis would exist for use of Sec. 386(2).

In the first appeal, this Court held that confirmation of Arrange-

ment was properly set aside by the Referee on the ground that non-disclosure of the divorce "award" constituted procedural "fraud" curable under Sec. 386(2), by affirming the District Court's act.

Next, the "fraud" having been cured by disclosure of the divorce "award", Appellant submitted an Amended Plan of Arrangement, but the Referee -- in an order not using the word "fraud" or mentioning Sec. 386(2)-- denied confirmation on the ground it was barred by the Superior Court "award" of the property to Appellee. This cloud on the title the Referee refused to undertake to remove. In the second appeal, this Court, misconstruing Sec. 386(2) and once again refusing to consider the question of title, affirmed the District Court order on the ground that supposed substantive and incurable "fraud" of unstated nature still tainted the Amended Plan of Arrangement, though in the order appealed the Referee had not even mentioned the word "fraud" but dealt only with "award".

In this third appeal, preceding the submission of a new plan, no plan whatever is involved, but only the question of Appellant's title to the major asset of his debtor's estate, the real property. As before, both Referee and District Judge have refused to consider and decide the key question of title as affected by the divorce "award" - now the only issue on appeal, totally disassociated from the question of "fraud" in any plan. In addition to abstaining from the exercise of District Court jurisdiction, they now seek to dismiss the entire proceeding, without jurisdiction for dismissal, without notice to creditors, and with flagrant denial to creditors of the benefits of the Bankruptcy Act. This Court is asked to interpret the "award" by well-settled law

SUMMARY OF ARGUMENT

Abstention from District Court jurisdiction to determine title to the Appellant debtor's assets is improper; title should be determined de novo, without accepting Superior Court decisions as final, and according to Federal and California law. Dismissal of the entire proceeding to avoid determining the title is improper also. Res judicata does not bar this appeal, as no Federal court has yet determined the title to debtor's community real property. The Superior Court "award" to Appellee did not transfer title, but only made a tentative determination of spouse's rights. District Court of Appeal affirmation of the award emphasized that it was not immediately effective; a future transfer of title to Appellee could not bar Appellant's Arrangement, and imposed no lien in favor of Appellee. The Superior Court "award" needs only proper interpretation as a personal judgment to reconcile it with valid confirmation of an Arrangement involving community real property.

The question of "fraud" does not arise in this appeal; the "fraud" mentioned in the two previous appeals was "fraud in procurement", or curable technical error, not substantive fraud in any plan of Arrangement, and not fatal fraud requiring dismissal of the proceeding. Actually, the alleged "fraud in procurement" charged was concealment of the immaterial divorce award, therefore no fraud at all; the real property title is in Appellant as debtor in possession, not in Appellee. No equitable relief in conflict with the Bankruptcy Act is justified for Appellee, whose interests and those of the parties' children will best be served by confirmation of Arrangement and restoration of the debtor to his estate.

A R G U M E N T

Part A: The Case at Bar and Applicable Law

APPELLANT IS NOT RELITIGATING CONFIRMATION OF ANY ARRANGEMENT

It is true, as stated by Appellee's Reply Brief, that two prior appeals have resulted in affirmation of Referee's orders respectively setting aside and denying confirmation of certain plans of Arrangement. However, THIS APPEAL directly involves NO PLAN, past or present, but is intended to clear the way for confirmation of a new plan to be considered later, after determination of Appellant's title to the community real property to be involved. There are two elements in any Arrangement with Creditors: (1) What assets does the debtor have that can be involved? (2) What plan can be devised for those assets that will be acceptable to creditors? It has become necessary to deal with these two elements of assets and plan because of a semantic tangle that has developed in this proceeding over the meaning of the words "award" and "fraud".

In both prior appeals, this Court has affirmed the Referee's order on ground that the Arrangement proposed was "tainted with fraud" of undetermined nature, although the Referee's first order, under Sec. 386(2), Bankruptcy Act, necessarily charged Appellant with "fraud in procurement" (i.e., mere technical error, minor and curable) and not fatal substantive fraud in the Arrangement itself. The Referee's second order denying confirmation of an Amended Plan of Arrangement did not use the word "fraud" at all, but this Court affirmed on ground of fraud carried over from the first appeal, though the Referee's ground was doubt concerning title.

The Referee's view -- long distorted by frivolous and confusing arguments offered this Court by Appellee's counsel, and unclear because of the dual significance of the word "fraud" -- is simply that the community real property belongs to Appellee by virtue of a Superior Court divorce award, and therefore (regardless of the rights of creditors) cannot be involved in an Arrangement by the Appellant. The Referee refuses to rule on the validity of the Superior Court award, accepting it in comity and leaving to the District Judge and to this Court the question of title.

What is being litigated in this appeal is merely that question of title, and the validity of the divorce award as a cloud on title, -- not the validity of any plan of Arrangement, or its fraudulence, but simply the single issue: Who owns the community real property? This issue has not yet been decided in any Federal court; Referee and District Judge improperly abstain from making an explicit de novo determination of title as a preliminary step in the proceeding, necessarily preceding confirmation of any Arrangement which involves the disputed property. Instead of applying Federal and State law to determine title, the Referee simply accepts, out of unwarranted comity, the original "award" by the Superior Court, ignores its nullification by the District Court of Appeal, misinterprets it as an immediate transfer of title rather than a tentative determination of future rights of spouses, assumes that it bars confirmation, and therefore seeks to dismiss the proceeding. The paramount and exclusive jurisdiction over a debtor's property conferred by the Bankruptcy Act requires the Referee to remove the cloud on the title by invoking applicable law; instead, he has

imposed a tremendous handicap on Appellant by relegating him to a higher court, with Appellee the prevailing party favored by the usual presumption in favor of the first judgment.

In view of the erroneous findings of substantive fraud improperly made by this Court in the two prior appeals, contrary to the findings of the Referee, Appellant now asks a decision on the single issue of title, free from the complications introduced by a simultaneous consideration of a Plan of Arrangement. This procedure is not relitigation; it is separation of issues in anticipation of of the successful confirmation of an Arrangement to which Appellant and his creditors are entitled, thus far thwarted by mishandling of the issues. Up to this point, the Referee has said "No title", the District Judges have said "Pass", and this Court has said "Fraud"; what is needed is consideration of the same issue by all judicial levels.

After evaluation of Appellee's divorce "award", Appellant's title will be established, the issue of "fraud" will disappear, and confirmation of a Modified Plan of Arrangement will proceed without obstacle. However, if Appellee's title to the community real property is affirmed, in fraud of creditors and debtor, no Arrangement will be possible, and dismissal of the proceeding will be proper; but in that event, a century of decisions by the California Supreme Court and the United States Supreme Court must be overturned, the supremacy of State divorce law over Federal bankruptcy law recognized, and principles of jurisdictional law revised, at least in the Ninth Circuit. In the Tenth Circuit, the closely parallel case of Panton v. Lee was decided in favor of the debtor, not the wife.

II

THERE HAS BEEN NO FRAUDULENT PLAN OF ARRANGEMENT IN THIS CASE

It is true that there has been fraud perpetrated in this proceeding, all of it by Appellee's counsel and his client. There has been no "fraudulent Plan of Arrangement", as Appellee's Reply Brief alleges (p.2, line 8), and no fraud of any kind by Appellant. The Referee has recognized no substantive fraud in an Arrangement. His order (composed, of course, by Appellee's counsel) setting aside the original Arrangement reads, in pertinent part (No.18854, Clerk's Transcript, p. 24):

> ". . it appearing . . that fraud was practiced by the debtor . . by concealing from this Court all facts of his marriage and divorce in the Superior Court of the State of California, in and for the County of Alameda. . ."

This order was made in accordance with Sec. 386(2), Bankruptcy Act which the Referee read into the record (No. 18854, Reporter's Tr., p. 38, line 10; p. 41). The "fraud" referred to in the Order is therefore necessarily the curable "procedural fraud" of Sec. 386(2) which permits later confirmation of an amended Plan of Arrangement, and cannot be substantive fraud in the Arrangement which would be fatal to the entire proceeding. "Procedural fraud" is limited to mere technical error, excusable and curable, such as omission of a creditor or an asset.

9Collier on Bankruptcy (14th Ed.) 592, 603; ¶ 11.02, 11.04

Obviously, Sec. 386(2) cannot remedy a debtor's loss of his entire estate to his wife; its invocation by the Referee was error, but enabled him to avoid a clash with the Superior Court, in comity.

The Referee -- and District Judge SWEIGERT-- should have declared the divorce "award" immaterial, its existence no bar to confirmation of an Arrangement involving the community real property, and its non-disclosure not "fraud in procurement". This Court, mistaking "procedural fraud" for "substantive fraud", affirmed the order on the ground that "The Referee found there was fraud in the Arrangement" (No. 18854, Jan. 24, 1964), although the Referee made no such finding of fraud in the arrangement but (necessarily, under Sec. 386(2)) found only fraud in the procedure. Thus, this Court made a new finding, diametrically opposed to the Referee's finding, and based on conflicting and uncertain evidence, as the opinion indicates. Such a substitute finding, invading the province of the trier of fact, this Court has no power to make; it should have remanded the case without affirmation, for clarification.

Smallfield v. Home Ins. Co.(1957) 244 Fed.2nd 337 (CA, 9th)

Since there was no fault in the Arrangement, but only a need for removing the Referee's doubt as to the real property title, Appellant amended the Plan and resubmitted it. The Referee denied confirmation, concluding that (No. 20107, Transcript, p. 33):

> "The Judgment of the Superior Court of Alameda County, California, awarding the real property to Frances Kelly Arnold was valid and and bars the involvement of said property in the arrangement proposed by the debtor on June 29, 1964.
>
> That the debtor, J. Howard Arnold, has no right title or interest in and to said real property.
>
> That confirmation of the proposed Amended Plan of Arrangement is barred by the decision of the Court of appeals for the Ninth Circuit."

This Court, affirming the District Court order, disregarded entirely the curative nature of Sec. 386(2) and the basic question of property title on which the Referee rested his decision, and again mistakenly presumed substantive fraud (No. 20107, Feb. 28, 1966):

> "The Amended Plan was . . 'essentially similar' in all material respects to the initial plan, the invalidity of which was finally adjudicated on the former appeal. That determination became and was the law of this case and of course precluded relitigation of the issue."

However, this decision rests on a misconception of the case.

III

THERE HAS BEEN NO FINAL ADJUDICATION OF ANY AND ALL PLANS

Affirmation of an interlocutory order under Sec. 386(2), setting aside a confirmation, was, of course, no "final adjudication" of anything except the invalidity of the procedure leading to that confirmation. Interlocutory judgments supply no basis for res judicata bars to further litigation.

Greenfield v. Mather (1939) 14 Cal. 2nd 228

Ryerson Inc. v. Bullard (1935) 79 Fed. 2nd 192 (CA,2nd)

Rejection of one plan does not forbid inclusion of any or all of its material features in a later plan, so long as the"fraud in procurement" is eliminated.

> ". . Sec. 386(2) continues the administration of the proceeding under Chapter XI and paves the way for the subsequent confirmation of a modified arrangement. . "

9 Collier on Bankruptcy(14th Ed.) 605; ¶11.04 [2.1]

Rejection of one arrangement does not prevent proposal of another plan, modified to cure the error in procurement. The Court should give debtor and creditors a fair opportunity to arrive at an Arrangement satisfying statutory requirements. (Cf. Opening Brief, pp. 20-21). That has not been done in this proceeding.

Rader v. Boyd (1959) 267 Fed.2nd 911 (CA, 10th)

Jacobs, In re (1917) 241 Fed.2nd 620 (CA, 6th)

Application of Sec. 386(2) to set aside one confirmation does not nullify the entire Arrangement and require dismissal.

> "It is quite true that the creditor can have no relief in this situation without proving fraud (in procurement) by the debtor; but it is a mistake to suppose that the whole 'Arrangement' must then be set aside. The first subdivision of Sec. 386 . . does indeed require that this be done, and that the estate shall be liquidated, and the second presupposes that the plan shall be altered or modified generally; but the third subdivision demands neither, it looks only to the specific correction of the wrong done if that may be accomplished without affecting 'adversely' the interests of innocent parties."

Levenson v. B.& M. Furn.Co. (1941) 120 Fed.2nd 1009 (CA, 2nd)

Appellant is therefore not estopped from proposing a modified plan similar in some or all "material respects" to the previous plans; but which of these material features of the original plan may be retained, and which must be eliminated? This Court's first opinion does not state, nor does the second offer helpful information. No decision on the property title having been made, that issue should be settled first. If Appellant's title was valid, what was the fraud? If invalid, by what laws?

ESTOPPEL BY RES JUDICATA IS WHOLLY ABSENT IN THIS APPEAL

The estoppel urged by Appellee's Reply Brief (p.2, lines 8, 11) is without support in prior decisions: determination of the issue of "fraud in procurement" of one Arrangement plan does not settle the issue of property title or the issue of "fraud in procurement" of any later confirmation. Litigation of undecided issues is proper.

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit on a different cause of action, the inquiry must always be as to the point or question actually litigated or determined, not what might have been thus litigated and determined."

Cromwell v. Sac County (1876) 94 U.S. 351 at 353

The issue of property title has not been ruled upon by this Court.

> "Where a number of grounds for dismissal of an action are urged, an order of a court . . without an indication as to the ground upon which the court acted can not be res judicata of all possible grounds.". ."

W.Coast Life Ins. Co. v.Merced Irr. Dist.
(1940) 114 Fed.2nd 654 (CA,9th)

If the judgment rests on procedural irregularity (e.g., fraud in procurement), not on the merits, there is no estoppel.

Thurston v. U.S. (1950) 179 Fed. 2nd 514 (CA,9th)

hus, neither establishment of Appellant's title nor confirmation f a new plan of Arrangement is barred by res judicata doctrine, nd both are demanded by stare decisis for the protection of the ights of debtor and creditors. There has been no final adjudica- ion of any present issue in this proceeding.

V

TARE DECISIS DOCTRINE DEMANDS DENIAL OF APPELLEE'S TITLE CLAIM

fter 5½ years of study of the law of this case, Appellant can ite no reported appellate decision, State or Federal, permitting wife to secure ownership of community property free of creditors' laims. The following decisions uniformly deny the wife's claim:

Hawk v. Hawk (1900) 102 Fed. 679 (DC, Ark.)

Gibbons v. Goldsmith (1915) 222 Fed.826 (CA,9th) (Wash.)

Gibbons v. Dexter Horton Bk.(1915) 225 Fed.424 (CA,9th)

Hannah v. Swift (1932) 61 Fed.2nd 307 (CA,9th) (Calif.)

Hornsby v. Hornsby (1936) 127 Tex.474, 93 SW 2nd 379

Potts, In re (1944) 142 Fed. 2nd.883 (DC,Ky)

Cummings, In re (1949) 84 Fed. Supp.65 (DC, Cal.)

Todd v. Todd (1955) 133 Colo. 1, 391 Pac.2nd 386

Panton v. Lee (1958) 261 Fed.2nd 183 (CA, 10th) (Okla.)

Britt v. Damson (1964) 334 Fed.2nd 896 (CA, 9th)

In the case at bar, stare decisis is the applicable doctrine, not res judicata, and calls for reversal of the District Court order.

VI

THE COMMUNITY REAL PROPERTY WAS NOT AWARDED TO APPELLEE

The Interlocutory Judgment of Divorce rendered Oct. 22, 1962, reads

in pertinent part:

"It IS FURTHER ORDERED AND DECREED that the community property of the parties hereto be awarded as follows:

To plaintiff: FRANCES KELLY ARNOLD:

All that real property situated in the City of Albany, County of Alameda, State of California, described as follows:

Lot 46, as said lot is shown on the map of "Terminal Junction Tract, Albany, California, 1914", filed August 13, 1914, in book 28 of Maps, at page 72, in the office of County Recorder of Alameda County,

and the household furniture and furnishings therein contained; together with the immediate and exclusive possession of said real property."

Though signed by Judge KRONINGER, this judgment was composed by Appellee's counsel and reflects his wishful thinking rather than settled California law, which permits no such title transfer. The real property described is that involved in the Arrangement, and composes most of Appellant debtor's estate. Reasons why Appellee did NOT acquire this property in fee, free and clear of creditors' claims, have been discussed (Opening Brief, pp. 9-17). They are:

1) Transfer of assets to wife and debts to husband is against law in California, and void; the debts must be considered.

2) The District Court of Appeal modified the property disposal provisions of the Superior Court judgment to take effect on Final Decree, not immediately; the award was tentative and prospective.

3) The "Award" was a personal judgment, dealing with spouses' rights, not with property title free of creditors' claims.

4) The real property had been seized by the U.S. District Court

n filing of Appellant debtor's original petition June 19, 1962.

5) Prior seizure by the Superior Court had not occurred; if it ad, that court would have been displaced as custodian by the U.S. istrict Court, acting under the paramount and exclusive power iven it by Congress in the Bankruptcy Act.

6) After June 19, 1962, any seizure by the Superior Court for the urpose of transferring title to Appellee, or imposing a lien in er favor, was unlawful invasion of Federal court custody.

7) Appellee had no prior lien or claim against the property, as a ife, which would warrant relinquishment of control by U.S.District ourt, in proceedings under the Bankruptcy Act.

he contention of Appellee's counsel, echoed by the Referee, that he "award" transferred title to Appellee and thus barred confirm-tion of Appellant's Arrangement with Creditors is preposterous nd without standing in either California and Federal law. In fact, ven Appellee's counsel himself at one time denied his contention:

> "It was never contended at any time, or at all, in the bankruptcy proceedings that this property was exclusively the property of the wife, since it could not have become her property until the Interlocutory period developed into a Final Judgment of Divorce." (No. 18854, Reply Brief, p. 2)

r does Appellant seek to "attack the State court's decision" ppellee's Reply Brief, p. 2, line 15); he asks only that this urt make the proper interpretation of the Superior Court "award" ich the Referee refuses to make, despite District Court of App-l denial that any immediate transfer of title to property was cluded in the Interlocutory Judgment (Opening Brief, p,13).

"In sum, the interlocutory decree is merely a determination that after the lapse of a year the parties would, if no impediments have arisen, be entitled to a decree dissolving the marital relation and disposing of the community property in manner described in the interlocutory decree. Its provisions are not operative until the entry of the final decree."

Boeson Estate (1927) 201 Cal. 36

t, in the order now on appeal, the Referee states (Tr.,pp.18-19):

"The Court finds: . . That the Superior Court . .awarded the real property . . to the debtor's . wife, Frances K. Arnold. The Court concludes that the title to the real property has previously been decided."

at of the District Court of Appeal decision (Opening Brief,p.13) stponing the effectiveness of the "award"? What of the necessary nality of a judgment as a basis for res judicata? What of the gal power of the Superior Court to make an award of title? The feree does not consider these factors, which would upset his eory of the case and require a decision for Appellant. The Dist-ct Court of Appeal decision of Feb. 14, 1964, was made after the rst decision of this Court on Jan. 24, 1964, but before the Ref-ee's denial of confirmation on Nov. 10, 1964, but did not affect s decision, although it completely nullified his notion that the perior Court effected a title transfer on Oct. 23, 1962, and us barred confirmation of Arrangement. The Referee erred in two parate ways: (A) Interpreting the "award" as an immediate trans-r of property title, valid though in fraud of creditors, and (B) cepting in comity such an "award" as a bar to confirmation, with independent scrutiny of its validity under Federal law.

VII

EQUITIES OF THE CASE REQUIRE NO DEPARTURE FROM SETTLED LAW

Appellee's counsel, finding the facts and the law wholly against his case, habitually indulges in viciously libelous attacks upon Appellant, with no ill effects upon his success in this litigation. Appellee's Reply Brief herein is no exception to his many falsifications, and seeks to arouse unwarranted sympathy for his client and antagonism toward Appellant. The six years of litigation which he decries is directly due to his tenacity in breaking up Appellant's home for financial gain derived from the Svengali-and-Trilby relationship he has established with Appellee. Six years of his machinations have produced incalculable damage to the lives of the six persons whose home he has insisted on breaking; continuation of the status quo for his benefit financially is grossly inequitable to the family, and in no way justifies the complete departure from settled law that is necessary to support Appellee's case.

VIII

NO HOME OF FOUR MINOR CHILDREN IS INVOLVED IN THIS PROCEEDING

Three of the four children who were minors in 1961-62 have come of age and, together with Appellee, have largely departed from home.

Jeffrey, 14, has lived in a fatherless home since the age of 10, limits his associations largely to boys from broken homes, does poorly in school, lives largely without supervision at home (e.g., operates a power saw at will), has lost his newspaper route through misbehavior, cannot play football because of poor health (perhaps traceable to poor eating habits and lack of sleep).

Joellen, 18, cannot attend U.C. because of poor high-school

rades, insisted on going away to school (to escape intolerable ome conditions, as her sister before her did?), now attends coll- ge in Florida, where she lives with her married sister. (Children n this family have I.Q. ratings of 125 to 142, and are all college aterial intellectually if not emotionally.)

Jonathan, 21, made no credits in high school during two years fter filing of divorce action, left home at 16 because of dissen- ion with his mother after father's eviction, joined Army at 17, ived at home as college student Sept.1966 to Oct.1967 but earned credits; now married, working as gas station attendant.

James, 24, twice dropped out of college; assumed responsibili- as head of household after father's eviction in March, 1963, t disappeared in April, 1966 (believed by Appellant to have suff- ed a nervous breakdown at that time); with no prior criminal ecord except motor vehicle offenses, wrote many bad checks in ril, September, December 1966; a convicted felon, served 8½ nths in Alameda County Jail, 1967, and awaits further felony osecution in the state of Washington.

Frances K. Arnold, 53, Appellee, University graduate in Home onomics but an unwilling homemaker; an exponent of ultra-permiss- e child (non-)rearing, discourages her children's education; has ent nearly all evenings away from home since April, 1957, osten- bly to earn money as practical nurse and companion, but actually avoid stress from undisciplined children; sued for divorce in 61 to escape possible support obligation if husband became an valid; has long been mentally ill, her condition worsened since 61 by medically untreated menopause and addiction to psychotoxic phetamine "pep-pills"; worked as upholstery seamstress, May to

ly 1962 only; now employed by Berkeley Humane Society.

ese are the people for whom Appellee's counsel is so solicitous. e "4 minor children" have dwindled to one, living in a 9-room use with his convicted-felon adult brother, with their mother ining them for dinner -- a fine family life! From April 1966 to ct. 1966, Jeffrey and Joellen, then 12 and 16, lived alone with- t adult supervision at night. It is Appellant's intention to store parental authority to this tragically broken home-- not, Appellee's counsel hints, to evict wife and children from their e (as she has done to him). Appellant urges that settled law be llowed toward a decision in this Court; such a decision will do violence to equitable principles, which may be disregarded. If, wever, the equities are considered, the sixth member of the ily group ought not to be disregarded:

J. Howard Arnold, 60, Appellant, former University professor, blic official; self-employed engineer, author, publisher; from 48 to 1961, increasingly ill with nervous exhaustion and colitis m stress of adjusting to undisciplined children and paranoid hizophrenic wife, and seriously ill in 1961; still in precarious alth from nervous stress of home disruption and futile litiga- n; still handicapped by loss of office furniture and equipment 1963 by wife's illegal seizure, as well as loss of office on rst floor of residence; has spent a total of 29 days in jail as debtor in Possession whom the Federal courts refused to protect m Superior Court usurpations of power; lived in home with wife r 16 months after filing of divorce action and 5 months after terlocutory Judgment, without incident, after 25 years of quarr- free marriage

VIII

APPELLEE'S FINANCIAL CONDITION IS BETTER THAN REPRESENTED

The phrase "meager earnings as a seamstress" grossly falsifies Appellee's economic position (Appellee's Reply Brief, p.3,line 8), and for that reason has long been a favorite expression of her attorney. She worked as a seamstress --not at home, but in an upholstery shop -- for only 3 months in 1962. Her income now, as a teacher, is much better. Much of the time since 1963, the household income has exceeded $1,000 a month. Unfortunately, both Appellee and son James are spendthrifts, and in the absence of Appellant's stabilizing influence, income gives little indication of living standards. Appellee has squandered $6,000 on payments to attorney and building contractor for needless and damaging alterations to family and home. She bought a new car in 1966, and has several times enplaned to Wisconsin to visit her mother. She is in good physical and financial health, despite her mental condition, and can offer no adequate excuse for swindling her husband and his relatives by opposing the Arrangement with Creditors, which seeks to secure loans directly traceable to her long-continued mental illness and default as a homemaker, 1949-63.

It is grossly untrue that Appellant is in contempt of the Superior Court for refusal to pay support money. He has never refused, and never been found in contempt -- although 3 abortive contempt proceedings have been brought against him, not to recover money but to prevent litigation of this proceeding by jailing Appellant, in abuse of process. Appellant owes Appellee nothing, but has a small credit balance owing to him.

The law obligates a Debtor in Possession to collect rent of property in his estate occupied by tenants (Sec.70a(5),(6), Bankr.Act).

Shapera, In re (1936) 86 Fed.2nd 506 ( )

Van Rooy, In re (1937) 21 Fed. Supp.431,(DC, Ohio)

Eastern Constr.Co.v. Trustee (1932) 242 Ky.648, 47 SW 2nd 67

Texes and loan installments paid by Appellee constitute offsets against rent due Appellant; unpaid support money is another offset, credited by Appellant husband to himself as debtor in lieu of rent. (The first loan outstanding in 1963 was very small, about $500.)

IX

REHABILITATION OF DEBTOR IS NOT A FUNCTION OF THE ARRANGEMENT

Appellee's Reply Brief (p.2, lines 13-17) incorrectly applies a Chapter X requirement to a Chapter XI plan, which need not rehabilitate the debtor, but need only be feasible.

Slumberland Bedding Co.,In re (1953)115 Fed.Supp.39 (Appellant's plan is self-executing and unquestionably feasible. Confirmation would also remedy the adverse influence on his rehabilitation presented by loss of his home and office to Appellee.

CONCLUSION

The District Court order should be reversed and remanded with instructions to proceed in accordance with settled Federal and California law.

Respectfully submitted,

Dated: Dec.21,1967.

J.Howard Arnold

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

J.Howard Arnold